

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LISALI REVOCABLE TRUST, a)	
Washington trust,)	No. 62818-6-I
)	
Appellant,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
TIARA DE LAGO HOMEOWNERS')	
ASSOCIATION, a Washington non-profit)	
corporation; LAWRENCE M. ISREAL and)	
SANDRA LEAVITT ISREAL, husband)	
and wife, and the marital community)	
composed thereof; W. RONALD)	
GROSHONG and JANE DOE)	
GROSHONG, husband and wife, and the)	
marital community composed thereof;)	
KARL V. REMICK and JANE DOE)	
REMICK, husband and wife, and the)	
marital community composed thereof;)	
JOHN and JANE DOES 1-10, as husband)	
and wife, and the marital community)	
composed thereof.)	
)	
Respondents.)	FILED: May 3, 2010
)	

Appelwick, J. — The Lisali Revocable Trust owned two units of a leaky condominium building. The homeowner's association worked with the developer to pursue certain repairs. Without seeking permission from the homeowner's association, Lisali conducted additional construction it believed necessary to

resolve the leaks. Lisali then sued the homeowner's association and its board members for contribution to the repair costs, and alleged multiple claims of breach of fiduciary duty. No issue of material fact precluded summary judgment on the fiduciary duty claims. Lisali failed to establish that it was owed contribution for costs incurred in its unauthorized repairs. We affirm.

FACTS

The following facts are undisputed. The Lisali Revocable Trust purchased the two top-floor units of the Tiara de Lago Condominium building upon its completion in 1998. Water intrusion issues became apparent in the building almost immediately. Some elements of the building were covered by a warranty provided by the developer, MKT Associates, LLC.¹ The patio sliding glass doors and the windows were also covered by a warranty from the manufacturer. Initially, the developer and the window manufacturer worked with Lisali to replace the doors and windows in the Lisali units in order to repair the leaking, first in 1999 and again in 2001. When the efforts failed to contain the leaks, Lisali concluded that additional repairs were needed and hired its own consultant to investigate the origin of the leaks, without notifying the Tiara de Lago Homeowner's Association (Association). In December 2003, heavy rains resulted in leaking from the Lisali units into the unit below.

The Association, the developer, and Lisali each consulted experts regarding the leak. Based on the recommendations of all the experts, the Association's Board of Directors (Board) approved a plan for repairs, centering

¹ The developer is not a party here.

on replacement of the patio doors and windows. The developer and the window manufacturer then made the repairs in 2004.

The parties dispute whether the 2004 repairs solved the water intrusion issue. Upon completion of those repairs, the Association considered the water intrusion issue solved. Lisali disagreed. In April 2004, Lisali's consultant recommended additional testing to the Board, to determine whether the source of the damage was actually the exterior weatherproofing. His recommendation involved removal of the stucco and building paper from the exterior walls. The developer's expert disagreed, stating that any additional investigation into possible sources of water intrusion should be pursued by removing the drywall from the interior walls. Unsatisfied with the repairs performed by the developer, Lisali conducted the additional testing. In 2005, a Lisali consultant determined that leaking persisted and recommended additional repairs to make the building watertight. Without written notice to or approval from the Board, Lisali undertook construction on the exterior wall, roofing, and decorative columns.

Lisali sued the developer for damages relating to the water intrusion and settled. Lisali then sued the Association for contribution to the remaining costs of its repairs. Lisali also claimed breaches of fiduciary duty by the Board and its members in their individual capacities relating to their behavior during the leak investigation and repair, as well as during a previous dispute regarding the installation of a T-3 fiber optics communication line.

The trial court granted summary judgment on all claims except the contribution claim. After a bench trial, the trial court dismissed the contribution

claim and awarded the Association fees and costs pursuant to the fee provision of the Declaration for Tiara de Lago, a Condominium (Declaration).

Lisali appeals.

DISCUSSION

I. Summary Judgment

Lisali alleges that the trial court erred by granting summary judgment on its breach of fiduciary duty claims and its claims against the Board members in their individual capacities.

A motion for summary judgment presents a question of law reviewed de novo. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). We grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We construe the evidence in the light most favorable to the nonmoving party. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

In ruling on a motion for summary judgment, the trial court is not permitted to weigh the evidence or resolve any existing factual issues. Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). But, questions of fact may be determined as a matter of law if reasonable minds could reach but one conclusion. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). The moving party has the initial burden to show that there is an absence of evidence to support the nonmoving party's case. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific, evidentiary facts that reveal a material

issue of fact. Dombrosky v. Farmers Ins. Co. of Wash., 84 Wn. App. 245, 253, 928 P.2d 1127 (1996).

Under the statute and the Declaration officers of the Board have a duty to exercise ordinary and reasonable care when performing their obligations and to act in good faith. RCW 64.34.090, .304, .308(1)(b). When dismissing the breach of fiduciary duty claims on summary judgment, the trial court found that the Board met the required standard of care when performing its obligations, finding “a complete absence of unreasonable conduct.”

Lisali first contends that the trial court improperly made a reasonableness determination on summary judgment, because it is a question of fact. Lisali is incorrect. Courts may dismiss claims on summary judgment if the parties fail to raise an issue of material fact concerning reasonableness. See, e.g., Cascade Auto Glass, Inc., v. Progressive Cas. Ins. Co., 135 Wn. App. 760, 767–771, 145 P.3d 1253 (2006) (holding that Cascade failed to raise an issue of material fact concerning the reasonableness of Progressive’s termination notice); Rizzuti v. Basin Travel Serv. of Othello, Inc., 125 Wn. App. 602, 617, 105 P.3d 1012 (2005) (holding that Rizzuti failed to raise an issue of material fact regarding the reasonableness of the insurer’s denial of coverage).

The Association put forth evidence that it acted reasonably and that it met the required standard of care by: retaining experts to examine the exterior of the building before the expiration of the developer’s warranty; negotiating a Tolling Agreement with the developer to address outstanding issues; hiring independent experts to address the leaks and demanding that the developer respond and

resolve the problem; and negotiating extended warranties from the developer and window manufacturer to cover the repaired components. This shifted the burden to Lisali to rebut the Association's claim by setting forth specific, evidentiary facts that reveal a material issue of fact.

Lisali alleged first, that the Association acted out of animus; second, the Association improperly used the developer as its agent to investigate and resolve leaks; third, the Association failed to properly undertake an investigation to discover the source of the leaks; and finally, that the Association intentionally excluded the Lisali units from the Tolling Agreement that it negotiated with the developer. These allegations do not preclude summary judgment.

A. Unreasonable Due to Animus

Animus is irrelevant because, as discussed above, the standard of care is objective: whether the Board exercised ordinary and reasonable care. This conclusory allegation did not raise an issue of material fact.

B. Unreasonable Due to Reliance on Developer

Lisali alleged that the Board acted unreasonably by using the developer as its agent² and by relying on the recommendation of the developer, an interested party. Lisali claims that because the building remained under warranty, the developer had a financial interest in finding that the leaks stemmed

² The parties contest whether the developer acted as the Association's agent. Lisali raised the agency question in an issue statement. This court will not consider an issue without argument and citation to legal authority. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). Lisali did not support this issue statement with argument or legal citation. Therefore, it is abandoned and will not be considered by this court.

from products covered by the warranty provided by the window manufacturer, rather than from other elements of the building, which the developer would have to pay to repair. Therefore, it was unreasonable for the Association to rely on the developer's distorted recommendation

Because both the building exterior and the doors and windows were under warranty, the Association turned first to the developer and window manufacturer to investigate the water intrusion issues in 2004. The Association reasonably hoped to minimize the cost of repairs to itself and its members. But, the Association did not blindly rely on the recommendations of those parties: it also conferred with its own consultant, Corke Amento, Inc. Although Lisali alleged at summary judgment that the Association's 2002 consultation with Corke Amento was unreasonably limited, it did not here or at summary judgment contend that the Association's 2004 consultation with Corke Amento was defective. In 2004, the Board weighed the recommendations of Corke Amento, the developer, the developer's consultant, and Lisali's consultant to determine how to proceed. Lisali has not raised an issue of material fact regarding the reasonableness of that process.

C. Unreasonable Due to Failure to Inspect for Additional Leaks

Lisali contends that the Board unreasonably declined to undertake further investigation to determine whether additional leaks existed beyond the repairs proposed by the developer. Lisali does not directly support this contention with argument or provide citation to the record to support its claim, as required by court rules. RAP 10.3(a)(6). Even if we deem that Lisali has properly placed the

issue before us, our review of the summary judgment record did not reveal evidence establishing that an issue of material fact existed on whether the Association unreasonably failed to investigate.

At the time the Association made its decision not to conduct the additional investigation sought by Lisali, it had a plan to address known leaks. That plan was based on the recommendations of developer, window manufacturer, and its own independent consultant and backed up by an extended warranty. The parties did not present evidence that those repairs failed to stop the known leaks. With respect to the affirmative actions taken, nothing in the record suggests any unreasonableness on the part of the Board.

Could reasonable minds disagree on whether it was unreasonable not to engage in further investigation of the building weatherproofing before commencing repairs? It is undisputed that at that point in time no leaks were known to exist beyond those in the limited common elements being addressed in the repair plan.³ The report provided by Lisali's consultant to the Board in April 2004 stated other problems may have existed based on the type of building and recommended more testing, including destructive testing of exterior walls. The developer's consultant responded saying the testing could disrupt existing weatherproofing (cause leaks) and alternatives to destructive testing existed, if

³ Although one document confirming moisture in a Lisali unit may have indicated the need for additional testing into the roofing and exterior wall construction, there is no evidence that the developer did not repair the issue along with the other 2004 repairs. In fact, in a later memorandum, Chris Norris explained that the issue may have been resolved. This document alone cannot raise an issue of material fact as to unreasonable behavior.

necessary.⁴ The trial court found that this did not raise an issue of material fact as to whether this constituted unreasonable conduct.⁵ We agree.

At summary judgment, the trial court also dismissed Lisali's second breach of fiduciary duty claim based on separate facts. In this claim, Lisali alleged the Association breached its duty by acting improperly during the negotiations of an indemnity agreement concerning Lisali's installation of a T-3 fiber optics line. Lisali raises no argument on appeal in support of this claim. We hold that the trial court properly granted summary judgment on the fiduciary duty claims and the claims against the individual defendants.

D. Unreasonable Not to Include Lisali Units in Tolling Agreement

On reconsideration, Lisali asserted the 2002 Tolling Agreement as evidence of unreasonable behavior by the Board. Lisali contends here that the trial court improperly denied the motion. The denial of a motion for reconsideration is reviewed for abuse of discretion. Chen v. State, 86 Wn. App. 183, 192, 937 P.2d 612 (1997).

In 2002, the Association and the developer agreed to toll the statutes of limitation and repose in order to allow the developer to make repairs. The agreement did not mention the Lisali units.

The language of the Tolling Agreement did not raise an issue of material

⁴ The developer's consultant expressed concerns about such testing, explaining that puncturing the weatherproofing elements, including the stucco and the building paper, might have permanently damaged the weatherproofing. He also indicated that similar testing could have been pursued by removing the interior walls instead.

⁵ Although once repairs began Norris continued to question the viability of the repairs, Lisali presented no evidence that his concerns were communicated to the Board. It cannot be concluded that the Board unreasonably ignored Norris's recommendations when Lisali has not established that the Board actually received this information.

fact as to reasonableness. Lisali presented no evidence that it provided information regarding leaks in its units to the Association prior to the drafting of the Tolling Agreement in 2002. Lisali was not prevented from having the developer make its requested repairs or pursuing legal remedy for failure to make repairs. Also, Lisali does not contend that it incurred additional costs because the warranty period was not tolled for the Lisali units. Reasonableness of the scope of that agreement must be tied to the ultimate issue. Because the failure to include its units in the Tolling Agreement did not contribute to Lisali's damages, this argument did not preclude summary judgment.

We hold that the trial court did not abuse its discretion in denying the motion for reconsideration.

II. Contribution Claim

Lisali demands contribution for repairs made to the common elements of the building to resolve water intrusion detected during pressure testing. Lisali asserts that, under the Declaration, all owners are responsible for repair and maintenance of common areas. It claims contribution under the Declaration for its expenditures.⁶ The trial court found that Lisali's contribution claim was prohibited due to failure to comply with the Declaration's notice provisions. We review the legal consequences of a contract term de novo. Martinez v. Miller Indus., Inc., 94 Wn. App. 935, 943–44, 974 P.2d 1261 (1999).

The Declaration gave the Board the power to regulate the use,

⁶ To the extent there was any equitable aspect of the claim rejected by the trial court, it has not been appealed.

maintenance, repair, replacement, and modification of common elements. The Declaration prevents alteration or construction to the common elements except upon the written consent of the Board. Lisali did not seek or obtain any such written permission. To the contrary, at trial Lisali's property manager admitted that Lisali did not obtain Board approval. And, even if the developer had been acting as the Association's agent, Lisali did not ask permission from the developer to pursue repairs. At trial, Lisali was unable to point to any testimony where notice was expressly given.

Lisali argues only that it was not required to give notice for repairs on common elements under the Declaration. Lisali's assertion is incorrect. As a matter of law, Lisali could not incur costs on behalf of the Association, because it failed to obtain written permission.

To any extent that Lisali is also arguing for contribution to costs related to repairs which the Association did adopt, for example its consultant's recommendations that were integrated into the developer's repair plans, those costs were expended to repair limited common elements (doors and windows). RCW 64.34.204(6). To the extent they were not covered by warranty, the unit owners are responsible for the cost of repairing limited common elements.⁷ Therefore, no contribution for those costs is available.

Additionally, Lisali claims that the Association is required to pay Lisali to restore the interior damage done to the Lisali units during repairs authorized by

⁷ Declaration 11.7.4 states, "Unit Owners will be responsible for the cost of such Maintenance Work for the Limited Common Elements reserved for or assigned to their units."

the Board. The repairs at issue were offered by the developer during the warranty repairs and were declined by Lisali. Declining the repairs waived this right. The damage was incident to repairs to limited common elements which, except for the warranty coverage, are the financial responsibility of the unit owner.

The trial court properly concluded that Lisali was not owed contribution for the cost it incurred.

III. Fees and Costs at Trial

The trial court awarded fees to the Association after trial based on the Declaration's fee provision:

In the event of a dispute which results in a lawsuit between the Association and a Unit Owner, the substantially prevailing party in the lawsuit, including any appeal thereof, shall be entitled to recover its attorney's fees and costs incurred in connection with the dispute.

Lisali challenges whether some of the costs and attorney fees expended were compensable. We review the legal basis for any award of attorney fees de novo, Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993), and the reasonableness of the amount of an award for abuse of discretion. Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). Condominium unit purchasers by contract agree to be bound by the covenants contained in the statutory declaration of condominium. We review the interpretation of contract provisions de novo. Sales Creators, Inc. v. Little Loan Shoppe, LLC, 150 Wn. App. 527, 530, 208 P.3d 1133 (2009).

Lisali first argues that the Association could not incur compensable fees

before the attorney fee provision was added to the Declaration in 2002. The trial court found the fee provision broad. It then held that all attorney fees and costs incurred in connection with the lawsuit were compensable, including fees incurred before the adoption of the attorney fee provision.

The fee provision awards fees for any lawsuit resulting from a dispute. The ordinary meaning of “dispute” is broader than the meaning of “lawsuit”. The fee provision was reciprocal; it inured to Lisali’s benefit if Lisali prevailed. The provision provided notice that filing a lawsuit would trigger the possibility that Lisali might be required to pay fees for the entire dispute. The term “dispute” reasonably includes prelitigation costs, including those incurred before the provision was added to the Declaration.

Lisali next challenges, without legal authority, fees incurred relating to insurance. Although the specific conversations that formed the basis for the fees are not well documented,⁸ it was not unreasonable for the Association to inquire about its insurance coverage regarding the items under dispute. Because the dispute between Lisali and the Association forced the Association to seek coverage by its insurance company, it was proper to conclude that these fees were in connection with the dispute and include reimbursement for those fees in the award.

Lisali’s remaining challenges, contending that certain fees and costs should not have been included in the fee award, are reviewed for abuse of

⁸ The record indicates only that the Association likely had insurance to cover common element damage. The itemized records show only that various attorneys for the Association discussed coverage with the insurer.

discretion. Weeks, 122 Wn.2d at 147. The challenged amounts include fees incurred for summary judgment motions, in defending individual board members, and in shadowing Lisali's litigation with the developer. Also, Lisali alleges that some costs lack sufficient detail. Lisali also challenges costs for a witness's travel to the mediation. All of Lisali's challenges were raised at the trial court level. The trial court concluded, in its discretion, that the above fees and costs were sufficiently reasonable and reasonably connected to the dispute at issue in order to award reimbursement to the Association. Lisali does not allege that the fees were awarded based on untenable reasons or some other abuse of discretion. Lisali cites no law or other authority in support of its various challenges to the fee award. There is no evidence of abuse of discretion here.

We hold that the trial court properly awarded the Association fees incurred prior to the litigation and in seeking insurance and did not abuse its discretion in awarding the Association the additional fees and costs.

IV. Fees and Costs on Appeal

Both parties request an award of fees on appeal in compliance with RAP 18.1. As previously noted, the amended Declaration contained a provision awarding attorney fees to the prevailing party in the case of litigation. A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal. Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989). We hold that the Association is entitled to reasonable attorney fees on appeal as the prevailing party.

We affirm.

Appelwick, J.

WE CONCUR:

Eleenyon, J.

Becker, J.